United States Court of Appeals for the Fifth Circuit

No. 21-10976

C. RAYMOND JONES, JR.,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:21-CV-1445

Before STEWART, HAYNES, and HO, *Circuit Judges*.

PER CURIAM:

A member of this panel previously DENIED the Appellant's motion for a Certificate of Appealability. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 23, 2022
Lyle W. Cayce
Clerk

No. 21-10976

C. RAYMOND JONES, JR.,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Northern District of Texas
USDC No. 3:21-CV-1445

ORDER:

C. Raymond Jones, Jr., Texas prisoner # 1107489, moves for a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition challenging his capital murder conviction as time barred. Jones does not challenge the district court's time bar determination or argue that he is entitled to equitable tolling of the limitations period. Therefore, he has abandoned these issues by failing to brief them. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). Jones argues: (1) he is actually innocent and should be allowed to proceed under the actual innocence exception in *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); and

(2) the district court used the wrong standard of review to evaluate his evidence of actual innocence.

To obtain a COA, Jones must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where, as here, the district court's denial of federal habeas relief is based on procedural grounds, this court will issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Jones has not made such a showing. Accordingly, Jones's COA motion is DENIED. Jones's motion for leave to proceed in forma pauperis (IFP) on appeal is also DENIED.

JAMES C. HO
United States Circuit Judge

United States District Court

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C. RAYMOND JONES, JR. a/k/a CLEOTIS RAYMOND JONES, JR., TDCJ No. 1107489	§	
v.	§	CIVIL ACTION NO. 3:21-CV-1445-S-BN
DIRECTOR, TDCJ-CID.	§	

ORDER

The Court dismissed Petitioner C. Raymond Jones, Jr. a/k/a Cleotis Raymond Jones, Jr.'s *pro se* 28 U.S.C. § 2254 habeas application with prejudice as time barred (under Rule 4 of the Rules Governing Section 2254 Cases) and denied a certificate of appealability (COA). *See* ECF No. 16. Petitioner noticed an appeal and moved for leave to appeal *in forma pauperis* (IFP). *See* ECF Nos. 17 & 18. And, on November 12, 2021, the Court denied Petitioner leave to appeal IFP and certified that his appeal is not taken in good faith, observing that Petitioner may challenge the finding that his appeal is not taken in good faith by filing a motion to proceed IFP on appeal with the Clerk of the Court, U.S. Court of Appeals for the Fifth Circuit, within 30 days of the November 12 order. *See* ECF No. 19.

On January 3, 2022, the Court docketed numerous filings from Petitioner, including another notice of appeal, another request for a COA, and multiple motions for leave to appeal IFP. *See* ECF Nos. 20-24. These filings all include the Fifth Circuit cause number assigned to Petitioner's appeal, No. 21-10976. The Court therefore concludes that these filings were made

(or Petitioner intended that they be made) in the Fifth Circuit and **DIRECTS** the Clerk of Court to **TERMINATE** them as motions in the district court.

SO ORDERED.

SIGNED January 5, 2022.

UNITED STATES DISTRICT JUDGE

United States District Court

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C. RAYMOND JONES, JR. a/k/a CLEOTIS RAYMOND JONES, JR., TDCJ No. 1107489	§	
v.	§	CIVIL ACTION NO. 3:21-CV-1445-S-BN
DIRECTOR, TDCJ-CID.	§	

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND DENYING A CERTIFICATE OF APPEALABILITY

Before the Court are the second Findings, Conclusions, and Recommendation of the United States Magistrate Judge entered in this case ("Second FCR") [ECF No. 10]. An objection was filed by Petitioner [ECF No. 15]. The District Court reviewed *de novo* those portions of the Second FCR to which objections were made, and reviewed the remaining portions of the Second FCR for plain error. Finding none, the Court **ACCEPTS** the Second FCR. The Court therefore **DENIES** the Motion for Reconsideration filed by Petitioner C. Raymond Jones, Jr. a/k/a Cleotis Raymond Jones, Jr. [ECF No. 9] under Federal Rule of Civil Procedure 59(e).

The Court previously accepted other Findings, Conclusions, and Recommendation in this case ("First FCR") [ECF No. 5] that habeas relief be denied and entered judgment on September 1, 2021. *See* ECF Nos 7, 8. Then, on September 17, 2021, the Clerk docketed Petitioner's objections to the First FCR. *See* ECF No. 13. Having now reviewed *de novo* those portions of the First FCR implicated by those objections, they do not affect, and provide no basis to reconsider, the Court's decision to enter judgment denying the habeas petition as time barred.

The Court previously denied Petitioner a certificate of appealability ("COA") as to the dismissal of his habeas petition. *See* ECF No. 7. But, because a COA "is required to appeal the

denial of a Rule 59(e) motion in a habeas case," *Mitchell v. Davis*, 669 F. App'x 284, 284 (5th Cir. 2016) (per curiam) (citing *Ochoa Canales v. Quarterman*, 507 F.3d 884, 887-88 (5th Cir. 2007)), considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court **DENIES** a COA as to its denial of Petitioner's construed Rule 59(e) motion.

The Court adopts and incorporates by reference the First FCR and the Second FCR in support of its finding that Petitioner has failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" or "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

But, if Petitioner elects to file a notice of appeal, he must either pay the $505 appellate filing fee or move for leave to appeal *in forma pauperis*.

SO ORDERED.

SIGNED October 14, 2021.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C. RAYMOND JONES, JR. a/k/a CLEOTIS RAYMOND JONES, JR., TDCJ No. 1107489,	§	
Petitioner,	§	
V.	§	No. 3:21-cv-1445-S-BN
DIRECTOR, TDCJ-CID,	§	
Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner C. Raymond Jones, Jr. a/k/a Cleotis Raymond Jones, Jr., a Texas prisoner, was convicted of capital murder in Dallas County and sentenced to a mandatory life sentence. See State v. Jones, No. F01-74866-KN (195th Jud. Dist. Ct., Dallas Cnty., Tex.). This conviction and sentence were affirmed in 2003, and Jones did not petition the Texas Court of Criminal Appeals for discretionary review. See Jones v. State, No. 05-02-00344-CR, 2003 WL 67994 (Tex. App. – Dallas Jan. 9, 2003, no pet.).

More recently, Jones filed a third (but not successive) application for a writ of habeas corpus under 28 U.S.C. § 2254, through which he argues that he is actually innocent and that his assertions of innocence are enough to overcome the AEDPA's statute of limitations. See Dkt. No. 3. The presiding United States district judge referred this petition to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference. And,

accepting the undersigned's recommendation, the Court dismissed Jones's habeas application with prejudice as time barred under Rule 4 of the Rules Governing Section 2254 Cases and denied him a certificate of appealability. See Dkt. Nos. 5, 7, 8; Jones v. Dir., TDCJ-CID, No. 3:21-cv-1445-S-BN, 2021 WL 3940635 (N.D. Tex. Aug. 17, 2021), rec. accepted, 2021 WL 3930724 (N.D. Tex. Sept. 1, 2021) (Jones I).

Jones now moves for reconsideration through a filing made less than 28 days after entry of judgment. See Dkt. No. 9.

"A motion asking the court to reconsider a prior ruling [that adjudicates all the claims among all the parties] is evaluated either as a motion to 'alter or amend a judgment' under [Federal Rule of Civil Procedure] 59(e) or as a motion for 'relief from a final judgment, order, or proceeding' under [Federal Rule of Civil Procedure] 60(b). The rule under which the motion is considered is based on when the motion was filed." Demahy v. Schwarz Pharma, Inc., 702 F.3d 177, 182 n.2 (5th Cir. 2012) (per curiam) (citing Tex. A&M Research Found. v. Magna Transp., Inc., 338 F.3d 394, 400 (5th Cir. 2003)).

Because Jones filed his motion within 28 days of the Court's judgment, "the motion is treated as though it was filed under Rule 59." Id.

Applicable here, a Rule 59(e) motion timely filed, within 28 days of judgment, "'suspends the finality of the original judgment' for purposes of an appeal." Banister v. Davis, 140 S. Ct. 1698, 1703 (2020) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 373, n.10 (1984)). At this point, then, "there is no longer a final judgment to appeal from," and, "[o]nly the disposition of [the Rule 59(e)] motion

'restores th[e] finality' of the original judgment, thus starting the 30-day appeal clock." Id. (citations omitted); see also United States v. Turner, 1 F.3d 1237, 1993 WL 309703, at *1 (5th Cir. May 7, 1993) (per curiam) (A timely Rule 59(e) motion "nullifies the simultaneously-filed notice of appeal." (citing Harcon Barge Co. v. D & G Boat Rentals, Inc., 784 F.2d 665, 668-70 (5th Cir. 1986) (en banc))). Therefore, the Court's "ruling on the Rule 59(e) motion merges with the prior determination, so that the reviewing court takes up only one judgment." Banister, 140 S. Ct. at 1703 (citation omitted).

Rule 59(e) "is 'an extraordinary remedy that should be used sparingly.'" Rollins v. Home Depot USA, 8 F.4th 393, 396 (5th Cir. 2021) (quoting Templet v. HydroChem Inc., 367 F.3d 473, 479 (5th Cir. 2004)). And, while its text "does not specify the available grounds for obtaining such relief," the United States Court of Appeals for the Fifth Circuit

> has explained that Rule 59(e) motions "are for the narrow purpose of correcting manifest errors of law or fact or presenting newly discovered evidence" – not for raising arguments "which could, and should, have been made before the judgment issued." Faciane v. Sun Life Assurance Co. of Canada, 931 F.3d 412, 423 (5th Cir. 2019) (quotation omitted). [The Fifth Circuit has] further noted that Rule 59(e) allows a party to alter or amend a judgment when there has been an intervening change in the controlling law. See Schiller v. Physicians Res. Grp., Inc., 342 F.3d 563, 567-68 (5th Cir. 2003).

Id.; accord Demahy, 702 F.3d at 182.

Controlling law has not changed since the Court entered judgment. And Jones presents no newly discovered evidence. But he does appear to seek Rule 59(e) relief claiming that the Court applied the wrong legal standard to his actual innocence assertions. See Dkt. No. 9 at 1-2 ("Petitioner would show that this Court has adopted

the Findings of the Magistrate Judge who urged this Court to use a Standard for New Discovered Evidence as defined by AEDPA standards, which the petitioner Actual Innocence claims do not fall under these standards. The Magistrate Judge stated that the 5th Circuit is undecided on this issue but in Finley v. Johnson, 243 F.3d 215 (5th Cir. 2001)[,] The Fifth Circuit while not holding this was the standard of review," "applied the Newly Discovered Evidence as not being sufficient to be 'Newly Presented' standard of review over the 'Newly Discovered' standard under AEDPA standards. This should be the Standard of review for petitioners 2254.").

Jones is not correct insofar as he believes that the Court applied AEDPA to his actual innocence assertions. Instead, as the Court explained, "a showing of 'actual innocence' can also overcome AEDPA's statute of limitations." Jones I, 2021 WL 3940635, at *3 (emphasis added; citing McQuiggin v. Perkins, 569 U.S. 383, 386 (2013)). "But the actual innocence gateway is only available to a petitioner who presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" Id. (quoting McQuiggin, 569 U.S. at 401 (quoting, in turn, Schlup v. Delo, 513 U.S. 298, 316 (1995))). And, unfortunately for Jones, his "vague arguments referencing evidence that he asserts was not discovered by him until January 2019 fall far short of new reliable evidence that may allow a petitioner to pass through the narrow actual-innocence exception to the AEDPA's statute of limitations." Id. at *5 (emphasis added).

The authority Jones cites, Finley, in the analogous context of overcoming a

procedural default, is consistent with the Court's consideration of his actual innocence assertions:

> The miscarriage of justice exception to the procedural default doctrine requires "'factual innocence and not mere legal insufficiency.'" United States v. Jones, 172 F.3d 381, 384 (5th Cir.1999) (quoting Bousley v. United States, 523 U.S. 614, 623 (1998)). To establish the requisite probability he was actually innocent, Tenny must support his allegations with new, reliable evidence that was not presented at trial and must show it was "more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup v. Delo, 513 U.S. 298, 327 (1995). Examples of new, reliable evidence that may establish factual innocence include exculpatory scientific evidence, credible declarations of guilt by another, trustworthy eyewitness accounts, and certain physical evidence. See id. at 324. A showing of facts which are highly probative of an affirmative defense, which if accepted by a jury would result in the defendant's acquittal, constitutes a sufficient showing of "actual innocence" to exempt a claim from the bar of procedural default. Finley v. Johnson, 243 F.3d 215 (5th Cir.2001).

E.g., Tenny v. Cockrell, 420 F. Supp. 2d 617, 625 (W.D. Tex. 2004); accord McGowan v. Thaler, 675 F.3d 482, 499-500 (5th Cir. 2012).

In sum, because Jones fails to show that the Court must correct a manifest error of law or fact, the Court should deny his construed Rule 59(e) motion.

Recommendation

The Court should deny the Motion for Reconsideration filed by Petitioner C. Raymond Jones, Jr. a/k/a Cleotis Raymond Jones, Jr. [Dkt. No. 9] under Federal Rule of Civil Procedure 59(e).

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. See 28 U.S.C. § 636(b)(1); FED. R. CIV.

P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. See Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: September 17, 2021

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE